No. 83-1181

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL ANGELO MELDISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prior conviction for smuggling a watch into the United States without paying the lawful duty is a "Federal * * * offense[] pertaining to antitrust violations, unfair trade practices, [or] restraints of trade" (18 U.S.C. 921(a)(20)), which would not constitute a predicate felony offense under the Gun Control Act of 1968.

2. Whether the statutory distinction in the Gun Control Act of 1968 between antitrust or trade violations and other non-violent offenses is constitutional.

3. Whether the shotguns and rifles purchased by petitioner are "firearms" within the meaning of 18 U.S.C. 921(a)(3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 722 F.2d 26. The opinion of the district court (Pet. App. A11-A17) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A9) was entered on November 28, 1983. The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York,

petitioner was convicted of willfully and knowingly making false and fictitious statements intended and likely to deceive a firearms dealer, in violation of 18 U.S. 922(a)(6) (Count One), and unlawful receipt and possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(h) (Count Two). Pet. App. A2, A11. He was sentenced to three months' imprisonment on the first count, to be followed by a three-year term of probation on the other.[1]

The evidence adduced below, which is generally not in dispute (Pet. 2), showed that petitioner had been convicted of making a false customs declaration in connection with bringing into the United States a lady's wristwatch worth $9,000, a felony offense in violation of 18 U.S.C. 542. Petitioner received the maximum fine and a two-year suspended sentence with probation. Four years later petitioner purchased two shotguns and two rifles from a dealer in New York. At the time of purchase, petitioner certified on Treasury Form 4473 that he had never been convicted of a crime punishable by imprisonment for more than one year. Pet. App. A3.

ARGUMENT

Petitioner contends (Pet. 6-11) that his prior conviction does not constitute a predicate offense under the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.* Alternatively, he argues (Pet. 11-15) that if the statute applies to prior customs offenses it is unconstitutional because it creates an irrational distinction among various types of non-violent criminal convictions. Finally, he asserts (Pet. 16-21) that the rifles

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[1] The government dismissed one count, charging conspiracy, before the case was submitted to the jury.

he purchased are not "firearms" within the meaning of the Gun Control Act. The courts below correctly rejected these claims. Pet. App. A4-A6, A12-A17.

1. The Gun Control Act of 1968 prohibits a previously convicted felon from receiving a firearm (18 U.S.C. 922(h)). The statute, however, excepts certain felonies from the category of predicate offenses. Persons convicted of "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar practices relating to the regulation of business practices as the Secretary may by regulation designate," are not subject to the firearms and ammunition disabilities imposed by the Gun Control Act (18 U.S.C. 921(a)(20)(A)).

Prior customs convictions are not exempted under the plain language of the statute. Nonetheless, petitioner contends that his prior customs offense pertains to the regulation of "business practices of international trade" (Pet. 7), and that the customs laws were designed solely to protect domestic goods from unfair foreign competition (*id.* at 8). Accordingly, he argues, his prior conviction falls within the statutory exclusion of offenses pertaining to "unfair trade practices" (18 U.S.C. 921(a)(20)(A)).[2]

The court of appeals, in a well-reasoned analysis, explained that "unfair trade practices" include only

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[2] Since the Secretary of the Treasury has not designated any offenses as being "similar" to the "regulation of business practices" (18 U.S.C. 921(a)(20)(A)), petitioner concedes that his customs conviction cannot fall within that category (Pet. 10 n.9). Petitioner also recognized below that his customs conviction did not involve an antitrust violation or restraint of trade; he agreed that his offense had to pertain to "unfair trade practices" to fall within the exemption (Defendant's Reply Memorandum of Law 2, 4, 6, 7).

those activities that "adversely affect either competitors or consumers" (Pet. App. A4). See also *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 241-244 (1972); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965). Petitioner was convicted of making a false customs declaration in connection with his attempt to smuggle a $9,000 watch into the United States. 18 U.S.C. 542. That conviction did not require proof of an adverse effect on competition or consumers (Pet. App. A5).[3] *United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978). Thus, petitioner's violation of 18 U.S.C. 542 does not fall within the category of excepted "unfair trade practice" offenses. Indeed, the essential character of petitioner's prior offense more closely resembles tax evasion or false statement offenses, which clearly subject the offender to firearms disabilities, than it does an "unfair trade practice" offense.

Petitioner contends, however, that the court of appeals' construction of 18 U.S.C. 921(a)(20)(A) is erroneous because the Bureau of Alcohol, Tobacco and Firearms (ATF) does not regard customs violations as predicate offenses for purposes of the Gun Control Act. According to petitioner (Pet. 9-10), that view was expressed by the ATF in "two informal advisory opinions" (C.A. App. 371) in connection with an indictment against Sears, Roebuck & Co. But, as the court of appeals noted (Pet. App. A5), petitioner can draw little support from this quarter.

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[3] 18 U.S.C. 542 proscribes the introduction "into the commerce of the United States [of] any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal."

Sears was charged in 1978 with making false customs declarations in the importation of Japanese television sets. See 19 U.S.C. 160 *et seq.* (Antidumping Act of 1921).[4] As a result of that indictment, the question arose whether Sears could, if convicted, obtain licenses at new locations to sell firearms. The ATF concluded in a 1980 advisory opinion to Sears that "[t]he circumstances which led to [the company's] indictment under section 542 * * * are such that the indictments are for Federal offenses which 'pertain to' unfair trade practices within the meaning of section 921(a)(20)" (C.A. App. 293). In a 1982 letter ATF restated its narrow view that antidumping violations were within the category of exempted offenses "directed at insuring the existence of a competitive marketplace" (C.A. App. 296).

The failure of a United States citizen properly to declare property in his possession at a customs checkpoint can hardly be equated with violation of antidumping statutes. As the court of appeals properly noted, the antidumping provisions at issue in the Sears litigation were "designed to prevent foreign merchandise from being sold in the United States at less than its fair value so that it materially injures or threatens material injury to a domestic industry" (Pet. App. A5). The crime for which petitioner was convicted plainly does not have a similar focus. As petitioner acknowledges (Pet. 7 n.6), customs dec-

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[4] The 1978 indictment alleged, among other things, that Sears had received over $1.1 million in illegal rebates from a Japanese television manufacturer. On January 17, 1984, a superseding indictment was returned against Sears, and the government has moved to dismiss the original indictment.

larations are required of foreign travelers in order to collect the import duties due on goods brought into the United States. Petitioner's reliance on an analogy to an antidumping violation, therefore, "is misplaced" (Pet. App. A5).[5]

Equally insubstantial is petitioner's argument (Pet. 9-10) that the rule of lenity requires resolution of the issue in his favor. The rule of lenity " 'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 13 (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). Here, there is no ambiguity in the statute, and customs offenses relating to single items smuggled into the country by individuals have no apparent nexus to restraint of trade or other unfair trade practices.

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[5] In any event, petitioner's suggestion that ATF's interpretation of 18 U.S.C. 921(a)(20)(A) accords with his own is unsubstantiated. ATF has advised the Department of Justice that its opinion in the Sears case was based upon the particular facts of that litigation, that the circumstances of the present case do not lend themselves to a similar interpretation, that in the agency's view petitioner's prior offense was a disabling predicate offense under the Gun Control Act, and that the agency's position in the Sears case itself is being reconsidered (May 13, 1983 Affidavit of Louis J. Freeh 3). Cf. *United States* v. *Matteo*, 718 F.2d 340, 342 (2d Cir. 1983) ("The opinion of one Attorney General [in another case] by its words is limited to the very specific circumstances considered therein and we do not regard it as particularly enlightening with respect to the circumstances presented in the instant case").

Accordingly, there is no basis for application of the rule of lenity.[6]

2. Petitioner also contends (Pet. 11-15) that there is no rational basis for a distinction between offenses pertaining to unfair trade practices and other business related crimes. He therefore argues that disparate treatment of the two similar categories is unconstitutional. This claim is predicated upon petitioner's assumption that "[t]he obvious rationale for [the exception for antitrust violations, unfair trade practices, or restraints of trade] in a gun control act is that persons who have committed such trade related offense[s] have shown no propensity for viocence" (Pet. 12). Petitioner's "rationale" for the lines drawn by Congress in the Gun Control Act, however, is simply unsupportable.

Congress's intent in enacting the Gun Control Act of 1968 was not nearly as limited as petitioner suggests. "The principal purpose of the federal gun control legislation * * * was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. 1501, 90th

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[6] Petitioner's assertion (Pet. 11) that the first question presented "involves concerns that are broader and intrinsically more significant to implementation of the [Gun Control Act]" than earlier decisions of the Court dealing with that statute is greatly overstated. As the court of appeals recognized (Pet. App. A4), even were petitioner correct in his interpretation of 18 U.S.C. 921(a)(20), the government could indict him under the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, which contains no exemption for trade-related felonies. 18 U.S.C. App. 1202(c)(2). Thus, review by this Court of the first issue presented by petitioner would have negligible practical import.

Cong., 2d Sess. 22 (1968)). See also *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 15; *Lewis* v. *United States*, 445 U.S. 55, 63 (1980); *Scarborough* v. *United States*, 431 U.S. 563, 572 (1977); *Barrett* v. *United States*, 423 U.S. 212, 220-221 (1976). To that end, "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *New Banner Institute*, slip op. 15. Congress could have more narrowly defined the class of "presumptively risky people" (slip op. 9 n.6) but chose not to. In fact, in 1968 Congress expanded the coverage of the earlier firearms statute (see Federal Firearms Act, ch. 850, 52 Stat. 1250 *et seq.*), which limited the statutory disability to those persons convicted of "a crime of violence" (§ 2, 52 Stat. 1251). In so doing, Congress signaled its intent to respond to lawlessness generally—not just crimes of violence. Thus, the courts below properly rejected petitioner's argument, concluding instead that Congress did not distinguish or intend a distinction between violent and non-violent crimes (Pet. App. A12-A13).[7]

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[7] In any event, petitioner's assertion (Pet. 12) that he committed a "non-violent trade offense[]" indistinguishable from the types of trade and antitrust violations exempted in the firearms statute is unfounded. Petitioner did not seek to contravene federal trade, antitrust, or antidumping laws; rather, his conduct was a species of criminal tax fraud—he attempted to smuggle a $9,000 ladies wristwatch without declaring and paying a duty on it. When threatened with a full body search, petitioner finally produced the watch but even then, in an effort to avoid paying the full duty, understated the cost of the watch by 33% (Government's Sentencing Memorandum 18). Thus, petitioner's furtive smuggling attempt, directed at depriving the government of its lawful customs revenue, shares no iden-

The Gun Control Act, moreover, is not unconstitutional because it applies to individuals with no predictable propensity for violence or unlawfulness (Pet. 15). The constitutional question " 'is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.' " *Mathews* v. *DeCastro*, 429 U.S. 181, 189 (1976) (quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975)). The classification in the Gun Control Act that is attacked by petitioner meets the standard of rationality. The court below thus correctly gave "deference to a 'legislative determination that, in essence, predicts a potential for future criminal behavior.' *Lewis v. United States*, 445 U.S. 55, 67 n.9 (1980)." Pet. App. A6.[8]

3. Finally, petitioner contends that the two rifles and two shotguns he purchased were hunting weapons and were intended to be used for that purpose (Pet. 16-21). Accordingly, he argues that they are not

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tity with trade offenses relating to commercial goods and the economic equilibrium of the marketplace. Indeed, petitioner's offense was not commercial or business-related in any way. Consequently, the statutory distinction between petitioner's criminal offense and business-related offenses that trace their recent origins to tort law is not irrational. See Pet. App. A6 ("[u]nfair trade practices found their origin in the common law of torts, and, even today, they are usually treated as civil offenses").

[8] Congress has also enabled convicted persons who allege no propensity for future criminality to seek exemptions under 18 U.S.C. 925(c). "The opportunity to obtain exemption under § 925(c) makes the prohibitory scheme * * * not merely rational, but fair as well." *United States* v. *Giles*, 640 F.2d 621, 627 n.9 (5th Cir. 1981).

regulated firearms under the statute.[9] This contention is frivolous. As the court below held (Pet. App. A6), shotguns and rifles fall squarely within the definition of weapons embraced by the statute.

The Gun Control Act defines a firearm as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. 921(a)(3)(A). Thus, any of the particular weapons involved here may be exempted only if "the Secretary of the Treasury finds [that it] is not likely to be used as a weapon, is an antique, or is a rifle which the

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[9] Petitioner claims (Pet. 18-19) that he was foreclosed from proving at trial that the weapons were intended to be used for sport; consequently "[f]or purposes of appellate review * * * it is established that the four guns that petitioner purchased from Allsports Sporting Store were hunting weapons and that his intention was to use them for that purpose." The record supports no such presumption. In fact, petitioner has been charged with using the weapons to assault and threaten other persons, in a pending two-count indictment. See *New York* v. *Meldish*, No. 88/1982 (Putnam County Ct.). Count One, charging first degree assault, and Count Two, charging reckless endangerment, both allege that petitioner used his "hunting" shotgun first as a club to beat someone with and then as a firearm which he shot in the direction of others to threaten and intimidate them. Another state indictment charged petitioner and others with assault and specifies that the weapons used included two Browning 12 gauge shotguns (like the ones purchased by petitioner (Pet. 3)) and a Winchester rifle. At petitioner's firearms trial the government objected to petitioner's attempt to establish his intent to use the guns for sport and announced that to rebut and impeach petitioner's evidence it would prove the actual use petitioner made of the weapons (Tr. 80-86). The court then excluded petitioner's evidence (*ibid.*). Under these circumstances, the court's actions do not support petitioner's assertion that the weapons were intended for a sporting use.

owner intends to use solely for sporting, recreational or cultural purposes." 18 U.S.C. 921(4). The Secretary made no such finding with respect to the firearms purchased by petitioner. Moreover, the legislative history lends strong support to the proposition that Congress did not intend a blanket exception for rifles intended by the owner for sporting use. The House report notes that "[h]andguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900." H.R. Rep. 1577, 90th Cong., 2d Sess. 7 (1968). It is thus inconceivable that Congress (which, as noted, specified an exception for a limited class of rifles) intended to exclude rifles and shotguns from the class of regulated firearms. The courts below were correct in rejecting that contention (Pet. App. A6, A14-A15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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